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APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

No. 47,095
No. 47,100
MRS. CAROLEE BIDDY
v.
STATE OF MISSISSIPPI
[January 8, 1973]

ROBERTSON, *Justice:*

Mrs. Carolee Biddy was indicted by the Hinds County Circuit Court Grand Jury for the murder of her 6-year-old stepdaughter, Mona Biddy. A change of venue was granted to the Circuit Court of Jackson County, where appellant was tried for murder, but convicted of manslaughter by a Jackson County Petit Jury. She was sentenced to serve a term of 20 years in the State Penitentiary.

About 7:55 A.M. on December 3, 1970, appellant called the Jackson Police Department to report the disappearance of Mona Biddy, her mentally retarded stepdaughter. A massive search was conducted by the Jackson Police Department, law enforcement officers of Hinds and Rankin Counties, three or four hundred National Guardsmen, and many civilians and students.

On December 8th, five days after her reported disappearance, Mona's body was found by two fishermen in a cove on the Rankin County side of the Barnett Reservoir. Her body was at the water's edge and water from time to time would lap over it.

The first assignment of error was that the corpus delicti was not proven to the exclusion of every reason-

able theory consistent with innocence.

The corpus delicti in a homicide case consists of two fundamental facts: (1) The fact of the death of the deceased, and (2) The fact of the existence of a criminal agency as the cause of death. *Pitts* v. *State*, 43 Miss. 472 (1870). Both facts of the corpus delicti may be proved by circumstantial evidence. *Perkins* v. *State*, 160 Miss. 720, 135 So. 357 (1931).

On the afternoon of December 8, 1970, immediately after the body had been found, Dr. Forrest Bratley, a skilled and experienced pathologist, performed a complete autopsy on Mona's body at the University Medical Center in Jackson. His detailed written findings (a part of the record) ended with Dr. Bratley's positive opinion that the most probable cause of death was suffocation. The report also stated:

> "The complete postmortem examination does not reveal any natural cause of death nor is there any evidence of any traumatic injuries which could have caused death. The toxicological examination does not reveal the presence of any poison in the blood or stomach contents."

On June 24, 1971, Mona Biddy's body was exhumed, and a second autopsy performed by Dr. Forrest Bratley in conjunction with Dr. Donald Dore, Jr., the pathologist at the Singing River Hospital in Pascagoula, Mississippi. This autopsy was performed at Barrytown, Alabama, where the child had been buried.

This second autopsy was performed for the express purpose of determining whether Mona had swallowed any Liquid Plumr prior to her death. No signs or indications of any kind were found that the child had swallowed any caustic or corrosive substance. After a

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very detailed and thorough examination on the witness stand, Dr. Bratley stated that in his opinion death was caused by suffocation and that this suffocation was by external application of force by someone stronger than the child. Dr. Bratley never wavered in his opinion as to the cause of death, even though he was extensively cross-examined as to other possible causes of death and the fact that findings of death by suffocation are similar to findings of death from heart disease, shock, laryngeal spasm, bronchial spasm, respiratory arrest and cardiac arrest. From his knowledge gained from personally performing the first and second autopsies, he clearly and decisively negatived any other cause of death. On the second autopsy, he and Dr. Donald Dore found no evidence whatsoever of Liquid Plumr or other caustic or corrosive substance in Mona's digestive tract or vital orgains. If Mona had had laryngeal spasm it would have had to have been caused by drinking Liquid Plumr or other caustic substance.

Dr. Howard Nichols, a skilled and experienced pediatrician of Jackson, who had been Mona's doctor for the first 1½ years of her life, after a detailed study of both autopsy reports testified that it was his considered opinion that the probable cause of death was suffocation due to external pressure over her nose and mouth. He further testified that it was his opinion that Liquid Plumr was not involved in Mona's death.

Dr. Arthur Hume, Associate Professor of Pharmacology and Toxicology at the University Medical Center and Toxicologist for the Mississippi Crime Laboratory, examined and tested blood samples, tissues of vital organs, gastric contents and other samples from Mona's body on December 9th, 1970, the day after her body

was found, for poisons and drugs. Dr. Hume testified that he would consider Liquid Plumr a poison. He found no poison of any kind in her system. He did find a slight trace of dramamine, a stomach settler.

Dr. Milton Helpern, the chief medical examiner of the city of New York, after examining the autopsy reports, testified that he could not state with certainty the cause of death. He testified as to possible causes only.

Dr. Lucien L. Leape, a pediatric surgeon with the University of Kansas Medical School, who had made a special study of problems linked with lye ingestion by children, testified that he could not say what was the cause of death. He did testify that he had never heard of any child dying as a result of swallowing Liquid Plumr.

The testimony of all of these witnesses, and the exhibits introduced, were for the consideration of the trial jury. We feel that there was ample evidence in the record to prove the corpus delicti beyond a reasonable doubt and to the exclusion of every *reasonable* theory consistent with innocence.

The next assignment of error was that the two oral statements made by appellant were inadmissible under the fifth, sixth, and fourteenth amendments to the Constitution of the United States.

It must be remembered, in discussing this assignment of error, that the appellant and her husband, Ted L. Biddy, asked the Jackson Police Department for its help in locating their mentally retarded daughter. Every lead that the police would get was discussed and examined with the Biddys. The police were in constant

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touch with the Biddys and the Biddys with them. Both were apparently interested in what had happened to Mona Biddy.

It must also be kept in mind that, at the specific instance of the Biddys, the Jackson Police Department and its trained and skilled investigators and indeed the law enforcement officers of both Hinds and Rankin Counties and of the State of Mississippi, had expended a tremendous amount of time and effort and thought into solving the problem of what had happened to Mona.

On December 15, 1970, the police had found another item of clothing apparently worn by Mona at the time of her disappearance, so they contacted Mrs. Biddy, and she called her husband. The end result was that Mr. and Mrs. Biddy came down to police headquarters.

Lieutenant Wesley L. Reeves, Jackson Police Department, who had been on the case from the beginning, in the presence of Lieutenant Price of the Jackson Police Department, and Thomas Zebert, County Attorney of Rankin County, asked Mrs. Biddy to go over once again the details of Mona's disappearance. Reeves testified that after she had done this:

> "Then we told her we'd like to talk to her about it, and before we did, we would like to advise her of her rights.
>
> "Q—All right. Now, who was in this conference room at this time?
>
> "A—Lietenant Price, myself, and Mr. Zebert, Tom Zebert.
>
> "Q—And you four were the only ones in there?
>
> "A—Yes sir.
>
> "Q—All right. Then, what did you do then?

"A—I told her that she did not have to talk to us; that she was entitled to an attorney, and what she did say could be used against her in court.

"In fact, I then told her that we had a list of her rights on a statement blank, and I would like for Lieutenant Price to read them to her, so she would understand it.

"Lieutenant Price did read this statement of her rights, one at a time, and then I asked her if she understood each, and she said she did. Mr. Zebert asked her if she understood them, and she said she did.

"We asked her what education she had, and she said she was a high school graduate. We were convinced that she understood her rights.

"Q—Did she tell you where she had been employed previously?

"A—Yes sir. She had been employed as a secretary for Michael Baker, an engineering firm.

"Q—What kind of spirit was she in at this time?

"A—She was very cooperative. She seemed to be in good spirits."

At this time she signed a written waiver, which set forth her rights in detail. Reeves, Price and Zebert then signed as witnesses to her signature. She denied any involvement in Mona's disappearance.

Later on December 15th Mrs. Biddy and her husband went in their car to Highway Patrol Headquarters. Her rights were again explained to her and she signed a second detailed waiver.

On the night of December 16th, Lieutenant Reeves, while off-duty and at his home, received a telephone call from the Biddys reporting that appellant had been attacked and stabbed. The Biddys wanted him to come to their home, so he called Lieutenant Price and they

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went to the Biddy home. Mrs. Biddy told them about the attack and how she had gotten away from her assailant. She had a superficial cut on her hip.

Late at night on December 26, 1970, Lt. Reeves received another telephone call from the Biddy home. It was reported to him that 2½-year-old Candice Biddy had been kidnapped. It was a very cold night and Lt. Reeves went immediately to the Biddy home. Mrs. Biddy stated that someone came in the window, came by Mr. Biddy who was asleep in the den, got Candice, and went back out the window, tying up the family dog and putting him into the closet. Mr. Biddy found Candice, scantily clad, near a ditch in the Biddy backyard. Lt. Reeves checked the window that Mrs. Biddy had pointed out and found dust on the windowsill that had not been disturbed.

Lt. Reeves was advised by Mr. and Mrs. Biddy that they were going to Georgia on the next day, December 27th, to visit Mr. Biddy's parents. Early on the morning of December 27th Lts. Reeves and Price went back to the Biddy home, looked around the backyard and the ditch but could find no evidence that someone had kidnapped Candice.

Being advised that the Biddys were ready to leave town and that Mr. Biddy would like to talk to them, the Biddys followed Reeves and Price back to police headquarters in their own car.

Out of the presence of Mrs. Biddy, Reeves and Price told Mr. Biddy that they had found that Mrs. Biddy had not modeled clothes for a local clothing store and received clothes for her services, as both Mrs. Biddy and Mr. Biddy had told them. They also told Mr. Biddy that Mrs. Biddy had not gone to a health studio once

a week, as she had told them. Reeves and Price also told Mr. Biddy that their investigation of the assault and stabbing of Mrs. Biddy had convinced them that it did not happen. Mr. Biddy agreed with them. They also informed Mr. Middy that Candice Biddy had not been kidnapped as Mrs. Biddy reported. Biddy agreed with them on this and asked to talk to his wife.

Before they had a chance to talk very much, Reeves was advised that Mr. Biddy's partner, Mal Sims, was downstairs and wanted to see Biddy. While Wright and Biddy were talking, Reeves and Price told Mrs. Biddy that they would like to ask her some questions, and before asking her any questions Lieutenant Reeves said:

> "[D]o you understand your rights? You have been advised of your rights before, and she said, yes, she understood them.
>
> "At that time, Mr. Biddy and Mr. Wright came back. Mr. Biddy came into the room, Mr. Wright stood at the door. He had told me previously that he was ill, and would have to go home. So, he left.
>
> "Q—Was Mrs. Biddy aware of the fact that Mr. Wright was there?
>
> "A—He came to the door, and the door was open. She was sitting right by the door. They did not talk, but he talked to Mr. Biddy.
>
> "Q—And did Mr. Biddy come in and talk to Mrs. Biddy?
>
> "A—Yes sir.
>
> "Q—All right. Tell me what happened.
>
> "A—At that time, Mr. Biddy began to talk to Mrs. Biddy, and asking her about these different instances, about the clothing store, about the health studio, about the stabbing and the kidnapping.
>
> "She admitted that she had not worked for the clothing store, and she partially admitted not

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having gone to the health studio as regularly as she had claimed to be going.

"She admitted that she had faked the stabbing, and had faked the kidnapping.

"At this time, Mr. Biddy became very emotionally upset, and—

"Q—What about the appearance of the defendant, Mrs. Carolee Biddy? How was she at this time?

"A—She was a little emotional, not very much, at that time. She seemed like she wanted to tell him something.

"At that time I told her 'Mrs. Biddy, now is a good time to tell Mr. Biddy if you were involved in the disappearance of Mona'. I told her that Mona was gone, she wouldn't—couldn't come back, and that she was afflicted, that the doctors had told us she would never get any better, and that now would be a good time to talk to her husband.

"They were sitting facing each other holding hands. She looked straight at Mr. Biddy, and said, 'Ted, I am sorry I did it.' She said 'Ted, I didn't mean to do it.' And she broke down. She stopped what she was going to say.

Mrs. Biddy then continued her story of what happened the night of December 2nd. Mona had gotten hold of some Liquid Plumr at about 7:30 P.M., had drunk some of it, that it made her violently ill and she vomited. Mrs. Biddy tried to feed her but Mona could not eat. Mrs. Biddy called Dr. Howard Nichols, her pediatrician, and Dr. Nichols advised her to examine Mona's mouth and if her mouth was burned on the inside to call him back. If Mona's mouth was not burned, she was all right and just give her something to settle her stomach. Mrs. Biddy put Mona to bed

around 8:30 P.M. Mrs. Biddy went by Mona's bed about 10:30 P.M. and found her "scooted down the bed" with the bed clothing wrapped around her head. Lt. Reeves continued:

> "She said she unwrapped the bed clothing and couldn't get any response from Mona. She said this frightened her, and she picked Mona up and took her out to the den, and laid her down on the couch. She said she just flopped down.
>
> "She said she started to call Ted, but she was afraid that people would think that she had something to do with it; that she had realized she was dead, and she was afraid to call Ted, she said.
>
> "She started to call a doctor, and she just decided to get rid of the body, and take the body so they wouldn't blame her with it. She carried her out and put her in her car and drove to the reservoir.
>
> "She drove to a particular spot near the Lakeview Marina, because she and Ted had spent a lot of time out there in the past. She said she put the body down near the bank, kissed it on the forehead, and left it there so it would be found, and then she came back home."

We think that this testimony was properly admitted. It is perfectly clear to us that Mrs. Biddy thoroughly understood her rights and that she had intelligently waived them, not once but twice in writing, and also several times orally. Even on December 27th, immediately before her statements she acknowledged that she understood her rights. There are no magic words that law officers must meticulously repeat each time they question a person. This conclusion was also reached in *Maguire* v. *United States*, 396 F.2d 327 (9th Cir. 1968); *Sossamon* v. *State*, 432 S.W.2d 469 (Ark. 1968); *People* v. *Hill*, 58 Cal. Rptr. 340, 426 P.2d 908

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(1967); *State* v. *Graves*, 259 La. 526, 250 So.2d 727 (1971); *State* v. *Rowe*, 468 P.2d 1000 (Wash. 1970).

Appellant next contends that the court erred in granting an instruction advising the jury that should they convict appellant of manslaughter, the court might sentence appellant to the penitentiary for a term not to exceed twenty years.

This is the instruction complained of:

> "The Court instructs the Jury for the State of Mississippi that if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, Carolee Biddy, is guilty of manslaughter, you should certify to the Court the following verdict, to-wit:
>
> > We the Jury, find the Defendant guilty of manslaughter.
>
> Whereupon the Court might sentence the Defendant to serve a term of years in the penitentiary, not to exceed 20 years."

This same contention was made long ago in *Stevenson* v. *State*, 136 Miss. 22, 100 So.525 (1924). The Court in *Stevenson* answered this argument in this way:

> "In the case now before us the instruction informed the jury that in case of a conviction of manslaughter the court might sentence the defendant to serve a term of years in the penitentiary, not to exceed twenty years. We do not think that this instruction can properly be said to be an invitation or inducement to the jury to compromise on the lesser offense, and, if this instruction was error at all, it was not prejudicial to the rights of the appellant and will not justify a reversal under the facts of this record." 136 Miss. at 29-30, 100 So. at 526.

In *Blalock* v. *State*, 148 Miss. 1, 113 So. 627 (1927), in ruling on a similar manslaughter instruction, the

Court had this to say:

> "In the case before us, the instruction on the punishment for manslaughter does not call the jury's attention to the minimum punishment, and does not, by inference, lead the jury to believe that, if so convicted, a light punishment will be inflicted. We think this distinction important between the Ellerbe case and this one. It is one thing to hold out the definition of a minimum punishment, and another to tell the jury of a maximum punishment. It was, in our opinion, the singling out, in the Filerbe case, the minimum features of punishment of manslaughter, that produced the reversal therein. It is difficult to see how it prejudices the right of a person being tried for a crime for the jury to know what the punishment is that may follow a conviction for that crime. It is true that the court administers the punishment, except in capital cases, and some others not here involved, and that the jury should not be told anything in reference to what that punishment will be; but we fail to see how the present instruction prejudiced the defendant's rights. It certainly did not lead the jury to believe he would be dealt with leniently. The maximum was stated, and the minimum was left out.
>
> "In so far as the effect on the jury is concerned, we cannot see it had any harmful effect upon his rights. Anything less than twenty years for manslaughter is in the discretion of the court, and it does in no wise prejudice the defendant's rights for the jury to know what the maximum would be. At least, we think it is apparent that his rights were not so prejudiced as to cause the court to reverse a judgment therefor. *Stevenson* v. *State*, 136 Miss. 22, 100 So. 525. We hold, therefore, that there is no reversible error in this objection to the instruction." 148 Miss. at 5, 113 So. at 628.

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The final assignment of error was that the trial court erred in overruling the motion to vacate the judgment because the jury verdict was returned on Sunday and the trial judge sentenced the appellant on Sunday.

The five-day trial was concluded on Friday, September 3, 1971, and the jury on that day, with the exhibits and written instructions of the Court, retired to the jury room to consider what verdict they should return. They were unable to reach a verdict and they resumed their deliberations on Saturday, September 4th. Still being unable to reach a verdict, they resumed their deliberations about 9:30 A.M., Sunday, September 5th, and about 2:30 P.M., they returned their verdict in open court. Monday, September 6, 1971, would be Labor Day. So, the Court inquired of Counsel for the Defendant whether they desired that sentence be deferred until a later date. Counsel for the Defendant responded that they did not so desire. Whereupon, the Court sentenced the Defendant to twenty (20) years in the State Penitentiary.

In *Burrage* v. *State*, 101 Miss. 598, 58 So. 217 (1912), a murder prosecution was concluded on Saturday night, and the jury returned its verdict into court at 12:06 A.M. Sunday morning. In that case, it was contended that tht verdict and judgment were null and void because rendered on Sunday. This Court affirmed the conviction and sentence, stating:

> "It is true that we have no statute providing that verdicts may be received on Sunday, and it may be that a judgment rendered on Sunday is void, but 'in regard to the delivery and reception of verdicts a different rule applies, as the rendering of a verdict is a mere ministerial act, and it is an act of necessity and charity to receive it and not

keep the jurors confined until Monday.' " 101 Miss. at 606-607, 58 So. at 219.

In *State* v. *Foss*, 158 La. 471, 104 So. 211 (1925), trial was begun on Friday and the taking of evidence was concluded on Saturday night at 11:20. Counsel for defendant stated to the court that he was eager to continue the trial. Whereupon, the prosecutor objected on the ground that if the trial proceeded and resulted in conviction that the continuation of the proceeding on Sunday might be urged as a ground for a new trial. Defense counsel gave his word that if the case were allowed to proceed no advantage would be taken of the fact that some of the proceedings had been held on Sunday. The case proceeded, with argument of counsel ending at 12:25 A.M. Sunday, at which time the jury was charged and the verdict was returned and recorded at 2:00 A.M., Sunday.

Appellate defense counsel (not the trial defense counsel) urged that these Sunday proceedings were void. In *Foss*, the Supreme Court of Louisiana held:

> "An accused has no right to stand by and suffer proceedings to take place on a 'statutory holiday,' and after verdict, in a motion to quash, ask to have the proceedings reversed on the ground that it was a holiday.
>
> "The objection should not have been postponed until after verdict, nor urged for the first time in motion in arrest.
>
> "Moreover, the proceedings on a statutory legal holiday are not necessarily null. They may be held on that day by consent. Besides, an accused may be concluded by his silence, if he chooses to remain silent when he is represented by counsel amply able to protect his rights.

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. . . . . .

"[A]n accused may waive his constitutional, statutory, or common-law rights, except when forbidden by some superior counter principle of law deemed necessary for his protection.

"There is no constitutional, statutory, or common-law principle which forbids an accused party from consenting to have his case argued, submitted, and determined by the jury and court on Sunday or a statutory legal holiday. . . .

. . . . . .

"*There is no question of the waiver of jurisdiction in this case. The court and the jury were legally constituted, and were competent to try the issue of guilt or innocence between the state and the accused.* The only question was whether the case should proceed to its conclusion on Sunday or be postponed to a future day.

"*Whether a trial shall take place on one day rather than another can in no sense be said to affect the jurisdiction and competence of the court.*

"The objection is purely technical and dilatory in its nature. If it had been made at the proper time, the case would have been delayed to another day, with the same result. The defendant has suffered no detriment caused by the continuance of the trial on Sunday.

"An accused party at whose instance and on whose persuasive promise a case has been continued and concluded on Sunday, and who took the chances of an acquittal, should not be permitted, after verdict of conviction, to challenge the regularity and legality of such proceedings.

"To ignore his request and promise to the court and district attorney whereby he gained a speedy determination of his case, and to set aside the

verdict on the ground urged, would be a palpable miscarriage of justice, destroy the sanctity of the court, and make a mockery of judicial procedure.

"*Our conclusion is that the prohibition of the continuance of the trial on Sunday of a case already begun does not affect the jurisdiction and competence of the court, and is not such as cannot be waived by an accused party.*" 158 La. at 475-478, 104 So. at 212-214. (Emphases added).

The judgment of the Circuit Court is affirmed.

AFFIRMED.

GILLESPIE, C. J., and PATERSON, INZER and BROOM, J. J., CONCUR.

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APPENDIX B

IN THE SUPREME COURT OF MISSISSIPPI

No. 47,095

No. 47,100

MRS. CAROLEE BIDDY

v.

STATE OF MISSISSIPPI

[February 26, 1973]

INZER, *Justice:*

ON PETITION FOR REHEARING

The only assignment of error in the Petition for Rehearing is:

> THE COURT DID NOT FULLY CONSIDER THE ADMISSIBILITY OF THE STATEMENT OF APPELLANT.

In her brief in support of her Petition for Rehearing, appellant quotes from *Miranda* v. *Arizona*, 384 U.S. 436, 444, 445, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694, 707 (1966):

> *If, however, he indicates in any manner and at any stage of the process that he wishes to consult an attorney before speaking there can be no questioning . . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with an attorney and have him present during any subsequent questioning.* (Emphasis added).

In our original opinion, we discussed at length the two occasions on December 15, 1970, when appellant's *Miranda* rights were explained orally in detail, and when she signed two written waivers setting forth her

rights in detail. We quoted the testimony of Lt. Reeves wherein he testified that on December 27, 1970, he again asked Mrs. Biddy if she understood her rights, and she replied that she understood them.

After a careful search of the record, we find that nowhere in this record does Mrs. Biddy, the appellant, request, indicate, hint or express a desire to speak with or consult an attorney; although she was well aware that an attorney was available. Nowhere in any shape, form or fashion does she express a desire to have an attorney present during any questioning, nor does her husband express any wish or desire to have an attorney present.

All statements that Mrs. Biddy made on December 27, 1970, were made freely and voluntarily and mostly on the solicitation of her husband.

Ted L. Biddy, the husband of appellant Carolee Biddy, testified for the defense on direct examination as follows:

> Q. Then, if you remember, what did you say to Carolee or Detective Price or Reeves?
>
> A. Well, I was up real close to her, I had her hands in mine, I was right up next to her. I told her, I says, "Honey, I've got something very serious to say to you now. They have told me that they have found no evidence that you were attacked that night, nor that Candice was abducted last night and they believe that you staged these as hoaxes."
>
> Q. Go right ahead.
>
> A. Well, she admitted that they were true by shaking her head affirmatively that she had. She was emotional, of course, during this. I then told her that there was something else that they had told me that I wanted to tell her and that was

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that they had told me that they had three witnesses who had seen a woman, fitting her description, walking around in a rose nightgown at the Main Harbor Marina on the night Mona disappeared.

Q. What did Carolee go on and say, what was her story?

A. Well, Lieutenant Reeves and Lieutenant Price started talking to her and asking her about it and she says, "Well, I said I did not go in to check on Mona before I went to bed but I did." She said that she had watched some TV program and had dozed off, it was 10:30 or 11:00 o'clock, and that she went in to check on her before going to bed and she couldn't see Mona in the bed. She said all she could see was a big fluffy pillow and she went over to get her out from under the covers; it was nothing unusual for Mona, she was a hyperactive child, and she would be a lot of times under the cover. No one could sleep with Mona because she was so hyperactive. She said that she went to get her out from under the covers and pull her up in the bed, straighten her up, and the covers were all twisted around her and that when she raised the covers up that it pulled Mona up with it and when the covers came off she fell back and she knew immediately something was wrong. She said she picked her up on her shoulder and took her into the den, laid her down on the couch with her head in her lap and checked her in every possible way, her breathing, her pulse, shaking her and finally realized that she was dead.

Q. What did she then tell the policeman that she did?

A. She said that she panicked. She said she could just see my ex-wife Ruth's face; that she knew she would be blamed. She said she started to come get me. She started to call the doctor but she could just see my ex-wife's face and that she panicked. And that she picked her up, put her in

the front seat of our car; she said she drove and didn't know where she was going but the next thing she remembers she was on the reservoir levee road and that she went to the area of the Lake View Marina, took her body out of the car, took her over to the edge of the bank on a grassy spot, laid her down, kissed her and drove back home. She said she couldn't remember anything about driving back home except that the car almost went out of control one time.

In summary, it is apparent from the record in this case that all of the constitutional rights of Mrs. Biddy had been fully explained to her, she fully understood them, and with this knowledge, she freely and voluntarily made the statements complained of, mostly at the solicitation of her husband. It is not contended that she was in any way coerced, threatened or made any promises by the officers. She never at any time expressed any desire to speak with or consult with the attorney with whom her husband conferred. Neither did she express any desire to consult with any other attorney or have an attorney present before she made any statement. A statement made under these circumstances certainly should be and is admissible in evidence.

For the reasons stated the petition for rehearing is denied.

ALL JUSTICES CONCUR.

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APPENDIX C

[Filed April 23, 1974]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION
CIVIL ACTION NO. S74-2(C)

CAROLEE BIDDY,

Applicant,

v.

JACK REED, WARDEN, MISSISSIPPI STATE PENITENTIARY, ET AL

Respondents.

The applicant (Carolee Biddy) filed her application for a writ of habeas corpus directed to the respondents wherein she requested relief from a twenty year sentence by the Circuit Court of Jackson County for the crime of manslaughter. Applicant was convicted of killing her retarded six year old stepdaughter on the evening of December 2, 1970. The child was found by a searching party on the reservoir about thirteen miles away from her home on December 8, 1970, resulting in an intensive investigation of the crime by the city of Jackson police officers. Applicant and her husband (father of the deceased child) cooperated with the police in their search and investigation and became friendly with Officers Reeves and Price who were assigned to the case. These peace officers visited the Biddys in their home and discussed their problems and progress with the case very freely on innumerable occasions.

Applicant, as stepmother of this retarded child, was always under consideration as a suspect. The officers

requested applicant's husband to take a lie detector test and requested him to request applicant to take such polygraph test at the same time. Both of them failed the test. Applicant insisted that some maniac was loose in the area and that he was responsible for the crime. Applicant pretended as a hoax that someone had stolen her own child through the window of its room and had left it in their yard in extremely cold weather. She next contended as another hoax that someone had attacked her and had inflicted certain wounds on her body in the skirmish. She later admitted the falsity of both representations. The officers investigated leads and checked on information almost daily with the Biddys at their home and at police headquarters in Jackson. Applicant was finally arrested and fingerprinted and booked for the crime of murder at police headquarters on December 27, 1970. The Biddys were at police headquarters at the officers' *request* prior to the Biddy's planned trip to Mr. Biddy's family in Georgia. The investigations of these officers up until that time were routine investigations, and never accusatory in nature. Charles Wright, a young attorney and friend of the family, employed John R. Poole, an experienced criminal lawyer, to represent the Biddys on December 27, 1970.

The facts in this case show that on the 15th day of December 1970 that these officers explained the *Miranda* rights to the applicant who signed a waiver. Another printed form of *Miranda* rights was signed by applicant at a later date not given and not shown in this record. In each instance she was positively told that before any questions were asked, though she was not at the time in custody, that she must understand that she had the right to remain silent and answer

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nothing; and that anything she said could be used against her in court, and that she had the right to talk to a lawyer and to have him with her during questioning; that if she could not afford a lawyer one would be appointed for her before any questioning, if she wished; and that she had the right to stop answering any questions at any time until she talked to a lawyer. She had a high school education and had been a secretary for a business firm. The officers testified that she understood her rights.

The court finds as a fact that applicant is an intelligent person and that she fully and completely understood her *Miranda* rights at all times, and that she acted with full knowledge of her rights at such times. Attorney Charles Wright had known Mrs. Biddy since 1967. Wright represented her husband in his business in Jackson. He was at the Biddy home from time to time when the officers were there and participated in discussions. He participated in the manhunt which resulted in finding the dead child at the reservoir on December 8, 1970.

The officers began talking with the Biddys on December 3, 1970, the day after the child disappeared. On December 15, applicant voluntarily went to police headquarters and identified the clothing in which the child was clad when found. Her attorney (Poole) told her not to sign anything for the officers. John Poole testified that he told the police that he did not want applicant to make any statements in his absence. The officers on this particular occasion (December 27, 1970) did not read to applicant her *Miranda* rights, but simply asked her if she understood such rights which had been previously explained and expressly waived,

and she answered in the affirmative. On December 27, 1970 after her attorney (Poole) had left the police station and promised to return the next morning, the applicant surprised the officers by voluntarily stating to them and to her husband for the first time that she found the child dead in bed and carried it and left it at the reservoir. She never signed a statement to that effect and was not asked to do so. On that occasion she promised the officers to accompany them the next morning to the reservoir where she would show them exactly where she deposited the body of the child. Her attorney (Poole) came to police headquarters early the next morning (December 28, 1970) after applicant's return from the reservoir.

Applicant was not arrested and booked for murder until the afternoon of December 27, 1970 when she first told the officers and her husband some of the facts about her participation in this crime. Prior thereto she was a mere suspect with others who were being investigated, but from that date she was accused of murder and was promptly arrested and charged with that crime.

There is nothing in this record before the Court to show that what applicant told the Court on December 27, 1970 was of any aid or benefit to the state, and the record does not show that the state offered anything at the trial which applicant divulged to them at such time. Due process requires that a criminal must understand her *Miranda* rights, and that such rights may not be abused with a resulting unfair conviction for that crime.

The applicant has not shown this Court by the greater weight of the more convincing evidence that

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any such advantage was taken of her by these officers which resulted in any unfair or improper conviction for this offense. She was convicted under this murder indictment of the offense of manslaughter of this child without any assistance from her for anything that she said to the officers, or did for the officers. She never signed any statement confessing any complicity in this crime. She showed the officers on December 28, 1970 where she placed the child at the reservoir on December 3, 1970, but the child's body was found out there on the reservoir by a searching party on December 8, 1970 without any assistance from applicant. The officers did, indeed, resourcefully and skillfully investigate this crime, and talked with this suspect extensively on numerous occasions about the crime, but always with no effect. Mr. Biddy repeatedly evinced his convictions as to his wife's innocence by assuring the officers that applicant loved the child and thought too much of her to hurt her.

The court finds as a fact and concludes as a matter of law that applicant was not convicted of this crime by reason of any unfair assistance from her to these officers in violation of her civil rights, but the facts are that she never told these officers the facts to this date as to how she committed this crime to take the life of this child. She is even now still contending at this time in this case that this child was suffocated by voluntarily drinking liquid plumber.

An autopsy of the body of this child was made and the experts could not find any liquid plumber in the autopsy. Some contention is made here that the state did not furnish applicant with all of the facts about this autopsy to have enabled them to give the Court and

jury the benefit of their best expert advice as to the cause of death of this child. The four photographs of the throat of this child were and are not sufficiently clear as to reveal to the examiner the existence or not of swelling in this area which was actually clearer and more revealing from the original material itself. Applicant's doctors had this original material in hand for weeks before the second trial of this case which resulted in this conviction. This child had been buried for some time before this autopsy, but the material itself revealed vastly more than did these pictures as to edema, or swelling in the area. The applicant and her experts could not possibly be adversely affected by the neglect to deliver these pictures and slides to them.

Expert testimony must be carefully analyzed and applied in this delicate area very cautiously. This Court is not impressed with this expert testimony and reasonable inferences which it deduces from it that these doctors are in a position to even give us the benefit of an educated guess as to any advantages or effect, or result of another trial. The District Attorney who tried this case testifies that he withheld nothing from applicant's attorneys and gave them all of the information which he had for their examination for weeks before the trial.

Among other things, applicant insists that her vested rights were violated in this conviction in that the state of Mississippi suppressed favorable evidence to her in violation of the rule announced in *Brady v. Maryland*.[1]

[1] *Brady v. Maryland*, 83 S.Ct. 1194 holds: "We now hold that the *suppression* by the prosecution of evidence *favorable* to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

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On July 27, 1971 the state court ordered the state of Mississippi to furnish the applicant through her attorneys and medical authorities for the purpose of analysis, study and evaluation the following material: (1) A duplicate of all microscopic slides and the paraffin blocks from which the slides were made of both autopsies; (2) A sample of all tissues taken from the body which were not embedded in the paraffin blocks; (3) All pictures taken at either autopsies; (4) A complete autopsy report of the second autopsy; (5) Any further medical information relating to the death of Mona Biddy in the hands of the State of Mississippi.

The contention of applicant's counsel to be properly understood and correctly applied must be considered in proper context. The applicant objects here for the first time to four certain photographs and slides made from the autopsy material of the victim's throat. The applicant contended on the first trial which resulted in a mistrial that this child died from having ingested a drink of liquid plumber. In furtherance of that defense, the applicant introduced as her exhibit in the case a specimen of liquid plumber containing the 6% solution of potassium hydroxide. The second autopsy was performed by the state in Alabama where the child was buried. Apparently, the sole objective of this autopsy was for the purpose of checking and testing the body of this child to see whether or not it contained any presence or effect of liquid plumber. The result was not any evidence against the applicant, but the second autopsy simply showed that the child died of strangulation, not in any wise induced by any swelling of the larynx and throat area occasioned by any liquid plumber. The autopsy revealed no liquid plumber in the body of the child.

The applicant complains here for the first time that four photographs made of this autopsy material and some slides were not delivered to applicant, or her counsel before trial. The evidence shows this Court in such connection that the July 27, 1971 order of the state court was substantially complied with by the state in the trial of this case and that any other or further compliance with the order of the court was waived.[2] The applicant says that her experts were unable in the brief time afforded at the trial to sufficiently examine and analyze and criticize these photographs and slides. Significantly, this second autopsy revealed facts already known to applicant, i.e., namely that all information given by applicant and all of her contentions were false and not in any wise supported by facts. The facts are that the attorneys for the applicant and more specifically their medical witness had the materials (sections of the child's throat) themselves in hand for weeks before the trial, and could have made photographs and slides as desired at all times. But the applicant never complained at the trial of any such neglect, or violation of any duty of the state under the court order to have delivered such material to their medical witness at an earlier time; and never at such trial requested any delay, or indulgence to examine and

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[2] In *United States of America v. Teodulo Diaz-Rodriguez*, (9CA) 478 F.2d 1005, 1007-8 in analyzing and applying *Brady v. Maryland*, supra, said: "A test has been phrased whether the undisclosed evidence was so critical that its absence prevented the defendant from receiving a fair trial under the Constitution. United States v. Hibler, 463 F.2d 455, 459 (9th Cir. 1972). But materiality—the existence of prejudice—is essential. A new trial is not automatically required whenever the prosecution's files subsequently reveals evidence of possible utility to the defense but of unlikely weight in altering the verdict. Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 105 (1972)."

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analyze such material as desired. The contention now made was clearly waived.

The evidence which the state discovered from this autopsy was not under such circumstances suppressed by the prosecution. Nothing favorable to the applicant in her defense of this indictment was revealed by the process. The second autopsy simply revealed unmistakably that the applicant's defense that this child died by reason of having drunk liquid plumber was not true. The testimony showed to the satisfaction of the jury beyond every reasonable doubt that this child was manually suffocated and did not suffocate by reason of any swelling occasioned by any ingestion of any poison such as liquid plumber. The facts and circumstances here show and even demonstrate that the naked eye can best detect swelling, and that slides and photographs of the area are of little value.

The evidence and testimony adduced by the applicant simply does not show this Court by the greater weight of the more convincing evidence that any constitutional right whatever of the applicant was violated by her conviction in this case. The Court finds as a fact and concludes as a matter of law that the applicant has failed to show the Court by a preponderance of the credible evidence that her conviction is void for any such reason in this case. The application of Carolee Biddy for a Writ of habeas corpus in this case is without merit and will be denied.

A judgment accordingly may be presented by the respondents to the Court for entry within five days after this date under the rules of this Court.

April 23, 1974

/s/ HAROLD COX
UNITED STATES DISTRICT JUDGE

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APPENDIX D

Carolee BIDDY, Petitioner-Appellant,

v.

Fred DIAMOND, Sheriff, Jackson County Jail, and Jack Reed, Warden, Mississippi Penitentiary, Respondents-Appellees.

No. 74-2385.

United States Court of Appeals,
Fifth Circuit.

July 18, 1975.

State prisoner filed a petition for a writ of habeas corpus. The United States District Court for the Southern District of Mississippi, William Harold Cox, J., denied the petition, and petitioner appealed. The Court of Appeals, Roney, Circuit Judge, held that full Miranda warnings were not required on December 27 and 28, dates of defendant's damaging statement and identification of place where she had left body, where defendant on December 27 in response to police question expressly stated that she remembered her rights as previously explained to her, even though defendant had on December 15 requested an attorney, since defendant had not been denied opportunity to consult with her attorney when requested; that, in homicide prosecution, state did not impermissibly suppress exculpatory evidence consisting of photographs, taken during autopsy, of physical sections of victim's body; and that failure to produce photographs pursuant to discovery order of state court, even if error as a state procedural matter, did not rise to a constitutional level.

Affirmed.

1. Courts 406.1(6)

Court of Appeals was not required to address appellant's points which, regardless of their merit, would not control outcome of appeal.

2. Criminal Law 406(2)

When a person knows her rights, and has even exercised the right to counsel, and has talked with counsel, later voluntary admissions can constitute a waiver of the rights to counsel and to remain silent.

3. Criminal Law 412.2(5)

There is no requirement that an accused be continually reminded of his rights once he has intelligently waived them.

4. Criminal Law 412.2(5)

Repeated warnings are not necessary to a finding that a defendant, with full knowledge of his rights knowingly and intelligently waived them.

5. Criminal Law 412.2(3)

Full Miranda warnings were not required on December 27 and 28, dates of defendant's damaging statement and identification of place where she had left body, where defendant on December 27 in response to police question expressly stated that she remembered her rights as previously explained to her, even though defendant had on December 15 requested an attorney, since defendant had not been denied opportunity to consult with her attorney when requested. U.S.C.A. Const. Amend. 6.

6. Criminal Law 641.4(1)

Even though an attorney is once requested or re-

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tained, the right to an attorney can be subsequently waived. U.S.C.A.Const. Amend. 6.

7. Criminal Law 412.2(4)

A person may voluntarily speak without an attorney present, even though he knows one to be on the way upon request, if the police actions are not compelling. U.S.C.A.Const. Amend. 6.

8. Criminal Law 351(2)

Where defendant was positively told more than once during morning that, if she did not want to, she did not have to make trip to reservoir, which she subsequently identified as place where she had left body, but defendant insisted that that was what she wanted to do, and thus, with full knowledge of her rights and additional admonition that she need not go, there was no legal impediment to preclude defendant from waiving those rights and making trip, and, having done so voluntarily, evidence as to conduct could be used at her trial. U.S.C.A.Const. Amends. 5, 6.

9. Criminal Law 700

In homicide prosecution, state did not impermissibly suppress exculpatory evidence consisting of photographs, taken during autopsy, of physical sections of victim's body, where state had no experts who would testify that photographs revealed any doubt as to cause of death, photographs were introduced at trial without objection and there was no indication the defense could not have had its experts take as much time as they needed to study photographs during trial.

10. Criminal Law 627.8(6)

Failure to produce photographs pursuant to discov-

ery order of state court, even if error as a state procedural matter, did not rise to a constitutional level.

11. Habeas Corpus 45.3(1)

Point relating to newly discovered evidence which had not been presented to state court could not be reviewed by a federal court on petition for habeas corpus.

Appeal from the United States District Court for the Southern District of Mississippi.

Before GOLDBERG and RONEY, Circuit Judges, and GROOMS, District Judge.

RONEY, Circuit Judge:

Petitioner, Carolee Biddy, was convicted in a Mississippi state court of manslaughter of her six-year old stepdaughter. The facts of the case are recited in some detail in the opinions of the Supreme Court of Mississippi affirming the conviction and denying the petition for rehearing at Biddy v. State, 277 So.2d 115 (Miss. 1973).

From the denial of a petition for writ of habeas corpus, after a full evidentiary hearing, petitioner presents essentially two appeal issues: first, whether admissions and conduct of appellant, used against her at the trial, were induced by the police in violation of her *Miranda* rights, and her constitutional rights not to testify against herself and to have effective assistance of counsel; and second, whether petitioner's constitutional right to due process was violated by alleged prosecutorial suppression of evidence, four photographs which were withheld by the state from discovery but which were introduced at trial. Finding no error, we affirm.

We are at once met with confusion as to the facts of

the case because of the failure of the district court to resolve some apparent conflicts in the evidence and to reflect in its opinion specific facts which the appellant indicates to be critical to the success of her petition. We have made a thorough review of the state court record, the testimony before the district court, and the extensive briefs and oral argument, however; and have concluded that, even with the inadequacy of the district court's opinion, the court cannot be held to be clearly erroneous as to the controlling facts, and that it was not in error as a matter of law in denying the petition for writ of habeas corpus. In other words, we have approached this case from the standpoint of whether, assuming the facts to be as oriented by the appellant but without the conclusory or judgmental overlay given them in appellant's brief, there is any base upon which to reverse the district court's refusal to grant the petitioner relief from the state court conviction.

A brief outline of the facts of the case will furnish sufficient base for an explanation of our decision. A full recitation as to all the details of the case would serve no useful purpose.

Early on the morning of December 3, 1970, petitioner called the Jackson Police Department to report the disappearance of Mona Biddy, her six-year old, mentally retarded stepdaughter. An extensive search for the child was conducted by the police, which eventually involved various other law enforcement officers of surrounding counties, three or four hundred National Guardsmen, and many volunteer civilians. On December 8, five days after her reported disappearance, Mona's body was found on the water's edge at a reservoir, about thirteen miles from the Biddy residence.

Wesley Reeves and Harry Price, the detectives assigned by the Jackson Police Department to conduct the investigation into Mona's disappearance, were in close contact with the Biddy family during the following weeks. On December 15, petitioner agreed to accompany these officers to police headquarters in order to identify an item of clothing apparently worn by Mona at the time of her disappearance. After the clothing had been identified, petitioner was asked if she would be willing to talk to the detectives about the details of Mona's disappearance. She agreed to do so and was taken to a conference room, accompanied by Reeves, Price, and a county attorney named Tom Zebert. She was then advised of her *Miranda* rights (Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)), and signed a written waiver indicating that she understood those rights. Reeves, Price, and Zebert each testified that they were convinced that she understood her rights and that her waiver was voluntary. In response to questioning on this occasion, she denied any involvement in Mona's disappearance.

Later that day, prior to taking a polygraph test, petitioner was again advised of her rights and she signed a second waiver form. She further evidenced her understanding of her rights by asking for "her lawyer" during the administering of the polygraph test. Upon that request, the test was halted and petitioner was questioned no further. That evening Detectives Reeves and Price stopped by the Biddy home and were advised by an attorney-friend of the Biddys, Charles Wright, that this was neither the time nor place for further questioning of petitioner. Accordingly, they departed without talking to Mrs. Biddy about Mona's disappearance.

During the next ten days, although the detectives did not further pursue questioning petitioner about Mona's disappearance, they were, on at least two occasions, called to the Biddy residence to investigate rather bizarre incidents involving petitioner and her family. On the evening of December 16, they investigated a report that Mrs. Biddy had been attacked and stabbed in the hip by an unknown assailant. They received another call from the Biddy home on the night of December 26. It was reported that petitioner's two and one-half year old daughter, Candice, had been abducted. By the time the detectives arrived at the Biddy residence, the child had been found by Mr. Biddy near a ditch in the backyard. The detectives found little evidence to bear out petitioner's story regarding each incident and concluded that Mrs. Biddy's accounts were "illogical." Mrs. Biddy later admitted that she staged both incidents.

On December 27, the Biddys were asked to come to police headquarters before they left on a trip to Georgia to visit Mr. Biddy's parents. Before leaving their house, and in the presence of the police officers, Mr. Biddy asked his business partner, Mal Sims, to call their attorney, Charles Wright, and ask him to meet them at the police station. Sims complied with the request.

At the police station, the detectives separated the two and talked with Mr. Biddy about several things that petitioner had told them, which they considered to be untrue. About this time Attorney Wright arrived and stated that he was ill and would summon another attorney. While Mr. Biddy was talking to the attorney, the detectives indicated they might want to question Mrs. Biddy and asked her, "Do you understand your

rights?" To this she responded that she understood them. Then Mr. Biddy came in and discussed several things with petitioner with the detectives present. During that discussion, she made the crucial statement to him that she had found the child dead from having swallowed Liquid Plumr and, fearing that someone would blame her for it, had taken the body to the reservoir. After this statement she was booked for murder. Subsequently, the attorney summoned by Wright arrived and told petitioner not to talk to the police unless he was present. The next morning she took the police to the reservoir and identified the place where she had left the body. It was the same place where the body had been found.

Petitioner makes five separate contentions, under her general *Miranda* attack, on the use at trial of the statement she made on December 27 and her showing, on December 28, the place at the reservoir where she had left the child's body. Parenthetically, we have noted petitioner's complaint that the district court was in error in stating that nothing told to the police on December 27 was of any aid or benefit to the state, that the record did not indicate that anything she said was offered at the trial, and that her actions on December 28 were of no assistance in the state's case. These statements were clearly erroneous, but do not seem to have affected the district court's consideration of the controlling issues in the case. For the purposes of considering this appeal, we assume that the use of petitioner's statements and conduct on December 27 and 28 in the state trial was crucial to the successful prosecution and conviction of the petitioner.

[1] The first two of petitioner's five points need not

be addressed because, regardless of their merit, they would not control the outcome of this appeal. First, petitioner contends that the waivers signed on December 15 of her Sixth Amendment rights were vitiated in view of her later request for a lawyer, and that in any event the waivers were "stale" by December 27 when she made the statements admitted at trial. Our decision does not depend upon the continued legal effectiveness of those waivers.

The next question posed by petitioner is whether the oral warning, framed as a question as to whether she remembered her rights on December 27, just before she made the damaging statement, was an effective *Miranda* warning, in light of her request for a lawyer on December 15. We think that it was.

The critical legal question is whether the overall activity of the police sufficiently comports with the requirements concerning the *Miranda* warnings to insulate the conduct and admissions against suppression.

[2-6] It is clear that when a person knows her rights, and has even exercised the right to counsel, talking with counsel, later voluntary admissions can constitute a waiver of the rights to counsel and to remain silent. United States v. Brown, 459 F.2d 319 (5th Cir. 1971), cert. denied, 409 U.S. 864, 93 S.Ct. 155, 34 L.Ed.2d 111 (1972). The question is whether the full *Miranda* warnings were required on December 27 and 28, even though in response to the police question petitioner expressly stated that she remembered her rights as previously explained to her. We think not. We have previously held that "there is no requirement than an accused be continually reminded of his rights once he has intelligently waived them." United States v. Anthony, 474 F.2d 770, 773 (5th Cir. 1973). A great

many courts, state and federal, have likewise held that repeated warnings are not necessary to a finding that a defendant, with full knowledge of his rights, knowingly and intelligently waived them. United States v. Anthony, 474 F.2d 770 (5th Cir. 1973); Miller v. United States, 396 F.2d 492 (8th Cir. 1968); Maguire v. United States, 396 F.2d 327 (9th Cir. 1968), cert. denied, 393 U.S. 1099, 89 S.Ct. 897, 21 L.Ed.2d 792 (1969); Gorman v. United States, 380 F.2d 158 (1st Cir. 1967); United States v. Kinsey, 352 F.Supp. 1176 (E.D.Pa.1972); State v. Gallagher, 36 Ohio App.2d 29, 301 N.E.2d 888 (1973); Commonwealth v. Abrams, 443 Pa. 295, 278 A.2d 902 (1971); State v. Rowe, 77 Wash.2d 955, 468 P.2d 1000 (1970); State v. Blanchey, 75 Wash.2d 926, 454 P.2d 841 (1969); Brown v. State, 6 Md.App. 564, 252 A.2d 272 (1969); State v. Magee, 52 N.J. 352, 245 A.2d 339 (1968); People v. Hill, 39 Ill.2d 125, 233 N.E.2d 367 (1968); State v. Lucia, 74 Wash.2d 819, 447 P.2d 606 (1968); People v. Schenk, 24 Cal.App.3d 233, 101 Cal.Rptr. 75 (1972); People v. Brockman, 2 Cal.App.3d 1002, 83 Cal.Rptr. 70 (Ct. App.1969).

We think that a further delineation on December 27 of petitioner's rights, which she had stated that she understood from prior explanations would have been needlessly repetitious. The district court was not clearly erroneous in finding that Mrs. Biddy fully understood her rights at the time she made the statement to her husband with the detectives present.

The argument that the request for an attorney on December 15 effectively foreclosed the legality of the activity on December 27 and 28 is not compelling. A series of cases have held that even though an attorney is once requested or retained the right to an attorney

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can be subequently waived. United States v. Hodge, 487 F.2d 945 (5th Cir. 1973); United States v. Dority, 487 F.2d 846 (6th Cir. 1973); United States v. Springer, 460 F.2d 1344 (7th Cir.), cert. denied, 409 U.S. 873, 93 S.Ct. 205, 34 L.Ed.2d 125 (1972); United States v. Brown, 459 F.2d 319 (5th Cir. 1971), cert. denied, 409 U.S. 864, 93 S.Ct. 155, 34 L.Ed.2d 111 (1972); United States v. Green, 433 F.2d 946 (5th Cir. 1970); Wilson v. United States, 398 F.2d 331 (5th Cir. 1968), cert. denied, 393 U.S. 1069, 89 S.Ct. 727, 21 L.Ed.2d 712 (1969); Coughlan v. United States, 391 F.2d 371 (9th Cir.), cert. denied, 393 U.S. 870, 89 S.Ct. 159, 21 L.Ed.2d 139 (1968).

It appears from the facts of each case relied upon by the petitioner that, even though an attorney was requested, the defendants were not permitted the opportunity to exercise their right to consult with an attorney. United States v. Blair, 470 F.2d 331 (5th Cir. 1972), cert. denied, Crews v. United States, 411 U.S. 908, 93 S.Ct. 1536, 36 L.Ed.2d 197 (1973); United States v. Priest, 409 F.2d 491 (5th Cir. 1969); United States v. Slaughter, 366 F.2d 833 (4th Cir. 1966). In the instant case, however, the petitioner was given the opportunity to consult with her attorney when requested. Even after consulting with her attorney she was free to remain silent and to have her attorney present during any interrogation. Having full knowledge of these rights, she could knowingly and voluntarily waive them on December 27. *Cf.* United States v. Brown, *supra;* United States v. Daulton, 488 F.2d 524 (5th Cir. 1973), cert. denied, 416 U.S. 989, 94 S.Ct. 2396, 40 L.Ed.2d 767 (1974). The district court was not clearly erroneous in finding that she did, in fact, waive those rights.

[7] The fourth issue as to *Miranda* is stated in the appellant's brief as follows:

> Whether *any* form of warning given on the morning of December 27, 1970, could comport with the requirements of *Miranda* when the police officer who claims to have given the warning, induces the damaging statements, after the appellant's attorney (obtained for appellant by her husband) left the police station because of his illness, and before the arrival of a second attorney known by police to be on his way to represent appellant, and whether said damaging statements elicited on December 27, 1970, can be admitted against her at her state trial.

The cases heretofore cited clearly indicate that the above issue must be resolved against the petitioner. A person may voluntarily speak without an attorney present, even though he knows one to be on the way upon request, if the police actions are not compelling. There is some question as to whether the activity between the police and the petitioner fall within the realm of "interrogation" as envisaged by *Miranda*, but even assuming the fact, with the husband present, and the knowledge that she need not speak until her attorney arrives, there is no legal impediment to voluntary statements.

[8] The last issue posed by appellant's brief in connection with the *Miranda* issue is this:

> Whether damaging admissions and conduct of appellant, induced by the police without any *Miranda* warning on the morning of December 28, 1970, after her arrest and when the police were specifically told by appellant's counsel that they were not to further question her can be admitted in evidence against her at her state trial.

The facts and law again resolve this issue against petitioner. She was positively told more than once on the

morning of December 28 that she did not have to make the trip to the reservoir if she did not want to. She insisted that this is what she wanted to do. With full knowledge of her rights and the additional admonition that she need not go, there was no legal impediment to waiving those rights and making the trip. Having done so voluntarily, the conduct could be used at her trial.

Outside of the specific points raised by the petition, we have viewed the overall conduct of the police to see if we could sense unfair conduct that might, although technically correct, nevertheless indicate a pattern that is contrary to the spirit of the Fifth and Sixth Amendments and the progeny of *Miranda*. With this overview, we do not have the deep and abiding conviction necessary for a finding that the district court was clearly erroneous in its findings and conclusions of law.

The second major point raised by petitioner on appeal concerns four photographs, taken during the second autopsy, of physical sections of Mona Biddy's body. The first autopsy had been performed within hours after the discovery of Mona Biddy's body. During the first trial of this cause, which ended in a mistrial, the defense interposed a theory that the death of the child had been caused by laryngeal edema resulting from the ingestion of a caustic solution known as Liquid Plumr, a household drain cleaner. Between the first and second trial, the child's body was exhumed and a second autopsy performed, during which the neck organs were removed, placed in a preservative, and subsequently photographed in the laboratory. From the neck organs themselves certain microscopic slides were made and these, along with the paraffin blocks used in preparing the sections and the neck organs themselves, were turned over to the defendant's medical expert. Although

the prosecutor was under a court order to turn over all medical data to the petitioner, the film from which the photographs were made was turned over to the Jackson Police Detective Bureau for developing. The state's medical witness could not recall whether he saw the photographs after their development.

At the second trial, the four photographs were admitted into evidence without objection, after defendant's attorney stated that he had not seen them before trial and asked for a brief recess. A five minute recess was taken. The defense's experts testified that they could not determine the cause of death of the child from the information contained in the autopsy report or in these photographs.

Petitioner's medical experts now say, and they so testified before the district court, that they can state with a reasonable degree of medical probability that the cause of death of Mona Biddy was the ingestion of Liquid Plumr, rather than strangulation or suffocation. These opinions were arrived at after reconsidering the photographs.

These photographs raise two problems, one of which we consider here, and one of which we do not.

[9, 10] To the extent that the argument is based on Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and a theory of state suppression of exculpatory evidence, we find no merit to the petitioner's contention, and affirm the district court's ruling. The state had no experts who would testify that the photographs revealed any doubt as to the cause of death, and there was, in fact, no suppression of evidence. The photographs were introduced at trial without objection, and there is no indication that the de-

fense could not have had its experts take as much time as they needed to study the photographs during the trial. The case simply does not fall within the *Brady* proscription of evidence suppression. *See, e. g.*, United States v. Cole, 449 F.2d 194, 198 (8th Cir. 1971), cert. denied, Woodard v. United States, 405 U.S. 931, 92 S.Ct. 987, 30 L.Ed.2d 806 (1972); United States v. Moore, 439 F.2d 1107, 1108 (6th Cir. 1971); United States v. Evanchik, 413 F.2d 950, 952-953 (2d Cir. 1969); United States v. Jordan, 399 F.2d 610 (2nd Cir.), cert. denied, 393 U.S. 1005, 89 S.Ct. 496, 21 L.Ed.2d 469 (1968). Furthermore, the failure to produce the photographs pursuant to the discovery order of the state court, even if error as a state procedural matter, does not rise to a constitutional level. *See, e.g.*, Woodward v. Beto, 447 F.2d 103, 105 (5th Cir.), cert. denied, 404 U.S. 957, 92 S.Ct. 325, 30 L.Ed.2d 275 (1971).

[11] The other prong of defendant's argument is not subject to review in a federal court because it has never been presented to a state court. The argument is that with these photographs and the new opinions of the expert defense witnesses, it now appears that the defendant is armed with evidence that no crime was ever committed. This is in the nature of newly discovered evidence. The point has not been presented to the state court, so that it cannot properly be reviewed by a federal court at this time. To the extent that the district court judgment may have passed upon this question, it is modified. *Cf.* Ross v. State of Texas, 474 F.2d 1150 (5th Cir.), cert. denied, 414 U.S. 850, 94 S.Ct. 141, 38 L.Ed.2d 98 (1973).

Affirmed.

BLEED THROUGH

APPENDIX E

Appellant's Statement of December 27, 1970

They were sitting facing each other, holding hands. She looked straight at Mr. Biddy, and said "Ted, I am sorry I did it." She said "Ted, I didn't mean to do it." And she broke down. She stopped what she was going to say.

Then she continued and went through the story about what she said had taken place. She said that on this particular night, December the 2nd, Mona had gotten ahold of Liquid Plumr, at about seven:thirty, and drank some out in the storeroom, and it made her violently ill. It made her vomit.

She tried to feed her, and she couldn't eat. She called the doctor and asked him what to do, and he said that if her mouth was not burned, and turning kind of white, that she was not seriously hurt, and to give her something to settle her stomach.

She said then Mona went to bed at about eight: thirty. She went to bed in the room with Lee Ann, which is Mrs. Biddy's daughter, and Mr. Biddy's stepdaughter. Usually one of the little boys sleeps in this room, but for some reason they changed, and Lee Ann was to occupy the room with Mona.

She said that Mr. Biddy went to bed shortly after that, and she stayed up and watched television with her son Rocky, who is ten or eleven years old. He was studying, and she was watching T. V.

Around ten, I believe, Rocky went to bed, and at ten: thirty, she said, she started to go to bed, and she said she went by Mona's room to look in on her. She said she found her—she said 'scooted down the bed', with the

bed clothing wrapped around her head.

She said she unwrapped the bed clothing and couldn't get any response from Mona. She said this frightened her, and she picked Mona up and took her out to the den, and laid her down on the couch. She said she just flopped down.

She said she started to call Ted, but she was afraid that people would think that she had something to do with it; that she had realized she was dead, and she was afraid to call Ted, she said.

She started to call a doctor, and she just decided to get rid of the body, and take the body so they wouldn't blame her with it. She carried her out and put her in her car and drove to the reservoir.

She drove to a particular spot near the Lakeview Marina, because she and Ted had spent a lot of time out there in the past. She said she put the body down near the bank, kissed it on the forehead, and left it there so it would be found, and then she came back home.

She said the next day, the next morning, she got up and fixed breakfast. She asked her children to wake up everybody. She said one of the boys—I'm not sure which one—Jimmy, I believe, went into the room—in fact I know it was Jimmy.

He went into the room, because that's where he usually slept, to get his clothing, and he told her that Mona was not in the room, and at that time, she said, she looked and saw the door to the carport partly open from the kitchen to the carport, or the den, and she notified Ted, and they began an immediate search for Mona.

That's the story she told us at that time.

. . . .

BLEED THROUGH

Q. Let me first ask you one other question: Who was present during the time she was talking to you?

A. Lieutenant Price, myself, and Mr. Biddy.

BLEED THROUGH

APPENDIX F

Defendant's Statement of December 28, 1970

Q. All right. The next day, December the 28th—

A. The next day, December the 28th, Lieutenant Price and I, and Nancy McAleer from the Juvenile Department went up to the jail to talk to Mrs. Biddy, and asked her did she still want to go out and show us where she took the body of Mona.

She said she would. We went downstairs to our car, and as we were getting into the car, I said 'Mrs. Biddy, you don't have to go it you don't want to.' She said 'I want to go.'

We got in the car and drove out Highway 55 North, toward Canton, turned in the direction of the reservoir, but just before we got on the reservoir road that goes over the dam, Lieutenant Price was driving.

He said, 'now, Mrs. Biddy, we want you to tell us every turn to take. We are not going to turn in any direction, unless you direct us to.' From that point on, she told us where to go.

We went on across the dam to a blacktop road that turned to the left. She said, turn here. We went up and she told us to turn in a gravel road. We turned in there and after getting in this particular section, she said 'that doesn't look like the place'.

I said 'all right, tell us where to go.' She directed us to turn around, and we came back out, went back north on this blacktop road, until we came to the Lakeview Marina road. We turned in there, went on around by the old Captain's Table, the place that had been a fish house, a place to eat, and had burned some months before. She stopped us at this point, said 'this looks like the place'. We got out and walked down to the water's edge, and she said 'this is the place'. At this particular spot there was an eight-foot moon-shaped cutout in the bank.

Q. I'll hand you State's Exhibit '18-t'. I want you to look at this and tell us what this is.

A. Yes sir, this is it. This is the spot.

Q. Show to the jury what you're talking about.

A. (Witness does as requested.) This cutout is the point, the spot she pointed out, right here. (Indicating.) This cutout right here is about eight feet across, and it's about a five-foot drop. She pointed to this spot, and said 'this is where I brought Mona'. She kissed her on the forehead and laid her down. We asked her 'in which direction did you place the head', she said—she pointed in the direction of the east, which would be on the picture this way. (Indicating.) She identified this place as being the spot she took the body to.

She became a little emotional, and we took her back to the office, and waited with her a few minutes, and Mr. Poole, and Mr. Biddy, I believe, and some other member of the family arrived, and we turned her over to them.

Q. And this place on State's Exhibit '18-t' is the same place where the body was found?

A. Yes sir. This is the exact spot.

Q. All right. How many miles is it from the defendant's home on Lynnwood Lane to the point where this body was found?

A. Of the two principal roads, the principal ways to go, one way it's thirteen five-tenths miles, and the other way it's thirteen three-tenths miles.

Q. Approximately thirteen miles?

A. Yes sir.

Q. All right. After you all came back then what happened, if anything?

A. Mr. Poole, we let him have a conference with Mrs. Biddy, and after he was finished, she was placed back in jail.

BLEED THROUGH

APR 1 1976
MICHAEL RODAK, JR., CL

In The

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1006

CAROLEE BIDDY,
Petitioner,

vs.

FRED DIAMOND, SHERIFF, JACKSON COUNTY JAIL, and JACK REED, WARDEN OF THE MISSISSIPPI STATE PENITENTIARY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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